



State of Arizona  
**Department of Education**

**Tom Horne**  
Superintendent of  
Public Instruction

**CN# 18-05**

**MEMORANDUM**

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**To:** School Health & Nutrition Program Sponsors

**From:** Mary Szafranski, Deputy Associate Superintendent  
Arizona Department of Education, Health & Nutrition Unit

Holly Mueller, Program Director  
Arizona Department of Education, School Health & Nutrition Programs

**Date:** October 15, 2004

**RE:** Q & A-Developing and Drafting Bid/Proposal Specifications

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The purpose of this memo is to provide further guidance and understanding regarding the issue of developing and drafting bid/proposal specifications related to the Child Nutrition Programs. Therefore, the following issues have been presented in a Q & A format to help facilitate this process.

- Q1. Does 7 CFR 3016.60(b) provisions (a contract cannot be awarded to a potential contractor that has drafted the bid/proposal specifications) apply to the potential contractor or the public local education agency (LEA), formerly know as the school food authority (SFA)?
- A. The requirements apply to the LEA.
- Q2. Does 7 CFR 3016.60(b) prohibit the LEA from attending manufacturer and dealer shows?

- A. The federal regulations do not limit the sources in which an LEA may obtain information.
- Q3. What is the difference between a potential contractor providing information versus drafting specifications, since the information provided by the potential contractor could be equal to a specification?
- A. The information provided by a potential contractor can be both general in nature and specific to their individual product, however, the key is that the LEA and not the contractor develops its own specifications.
- Q4. If the LEA makes minor changes to the specifications provided by a potential contractor, can the LEA award the contract to that potential contractor?
- A. The LEA alone is responsible for developing the specifications that are actually used in its solicitation. The critical key is to follow federal regulations such that the intent to promote open and free competition is allowed.
- Q5. Would a food service management company (FSMC) violate federal regulations if the FSMC drafted a provision to amend an existing LEA-FSMC contract?
- A. It is the responsibility of the LEA to draft and develop any language to amend an existing contract.
- Q6. A manufacturer that directly sells its products to customers also uses distributors and dealers. If the manufacturer agrees not to bid on the procurement but writes the bid specifications, can the LEA still purchase the manufacturer's product from another distributor or dealer?
- A. Any attempt to circumvent the intent of federal regulations is strictly prohibited.
- Q7. Based on the above question, what if the manufacturer does not sell its products to customers but instead offers it through dealers and distributors of which some are exclusive. Is it allowable to restrict the eligible bidder's pool to only those bidders that are not exclusive dealers and distributors of the manufacturer?
- A. No. The LEA must promote free and open competition.
- Q8. In most requests for proposals, some parts of the contract will not be written until after the negotiation phase has been completed. Usually one party will agree to draft the contract terms representing the results of the negotiations. Can the LEA allow the FSMC to draft these negotiation results and still enter into a contract with that FSMC?

- A. To avoid any potential violation of federal regulations the LEA should draft all the contract terms representing the results of a negotiation.
- Q9. Does 7 CFR 3016.60(b) apply only to formal (exceeding the small purchase threshold) procurement or to all purchases?
- A. The provision applies to the acquisition of goods and services using written specifications. Therefore, if state or local procurement regulations require written specification requirements then this provision would apply.
- Q10. Is there a corresponding requirement to 7 CFR 3016.60(b) for a non-profit LEA?
- A. Yes. A non-profit LEA is already prohibited from awarding contracts to potential contractors that drafted procurement documents. That prohibition is stated in 7 CFR 3019.43.

If you have any questions or concerns regarding this memo, please contact the Health and Nutrition Contracts Officer, Brian Walsh at (602) 542-6208 or [bwalsh@ade.az.gov](mailto:bwalsh@ade.az.gov).